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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW, PUBLISHERS, INC., and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—v.—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PEN AMERICAN CENTER, *AMICUS CURIAE*

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August 20, 1984

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In the
Supreme Court of the United States
October Term, 1984

HARPER & ROW, PUBLISHERS, INC., and THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

v.

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PEN AMERICAN CENTER, AMICUS CURIAE*

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* Letters of consent to the filing of this brief have been filed by all parties with the Clerk of the Court.

INTEREST OF AMICUS

PEN is an international organization of writers dedicated to preserving freedom of expression and the right to write without fear of censorship or government harassment. PEN American Center is a member of International PEN, which has headquarters in London and centers in over 60 countries. Notable cases in which PEN American Center has actively participated include Korean poet Kim Chi Ha, Yugoslavian writer Mihajlo Mihajlov, and Kenyan novelist Ngugi wa Thiang'o. Members of PEN have engaged in missions to government officials and prison authorities, have submitted letters and legal papers, and have participated in public protests on behalf of imprisoned writers.

PEN American Center has a deep and keen interest in the questions presented by this lawsuit. As an organization of 1,800 professional authors, PEN American Center is and has been actively concerned with the protection of the copyrights of authors. PEN American Center also has an ongoing interest in insuring that the availability of information to the public is maximized at all levels so that there can be informed public debate as to government decision-making.

Accordingly, shortly after this suit was filed, PEN American Center sponsored an open meeting at which representatives of the petitioners and the respondents spoke and presented their views. There was extensive debate,

discussion, and questioning about the legal and policy issues involved. At that time, PEN American Center decided that in its view the balance struck between copyright protection and protection of free expression (as set forth both in the fair use doctrine and the First Amendment) should lead to a determination that the Nation had not violated the copyright laws as a result of its reporting about the Ford manuscript.

PEN American Center is particularly concerned about the control by our government and its officials over information. It believes that high officials of government may not claim property rights either in materials generated by them while serving as

public employees or over the information they learned in that capacity. PEN American Center believes that the copyright laws should not be applied beyond their legitimate limits and that copyright should not be extended to materials, conversations, and writings that may not "belong" to anyone and, in particular, do not "belong" to the petitioners.

PEN American Center believes that writers should be free to challenge present or former government employees who discuss their activities while in office, to make use of the same information as that disclosed in official memoirs, and to describe the incidents, conversations, or events in those memoirs as a predicate to their own

writings on the subject. A proper analysis of copyright law does not and cannot grant any monopoly to memoir writers in those events.

For these reasons, PEN wishes to present its views in the following pages. Specifically, this brief is directed to two crucial issues: (1) what copyright claims may be made with respect to government documents or to conversations had by government employees acting within the scope of their offices and duties; (2) what copyright claims may be made with respect to the government official's description of events, incidents, or facts in which he participated. It is the position of the PEN American Center that no copyright claims can be made in

the first category and that copyright claims in the second area are extremely limited.

ARGUMENT

POINT I

NEITHER PRESIDENT FORD NOR ANY PERSON CLAIMING BY, THROUGH, OR FROM HIM CAN ASSERT COPYRIGHT IN GOVERNMENT DOCUMENTS OR IN OFFICIAL CONVERSATIONS BY OR BETWEEN GOVERNMENT OFFICIALS

The Nation article at issue here contains 2,250 words. Of that total, 785 words quote from President Ford's unpublished manuscript. At first blush, that proportion, 30 percent, seems high. But it is a false comparison. Upon further analysis, it appears that well over half of the 785 words -- 451, in fact* -- are either government

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* See Addendum A to the Defendant's Post-Trial Memorandum. (Joint Appendix ("JA") at 603-625)

works or noncopyrightable conversations. In these categories belong the following: (1) government documents (the Ruth memorandum relating to possible criminal prosecution of former President Nixon; then Vice President Ford's written statement to Haig about Nixon's resignation); and (2) contemporaneous conversations by government officials to Ford relating to their governmental functions.* Since neither President Ford nor any of the petitioners can claim copyright in any of these materials, there remains a total of only about 300 words quoted in the article as to which ownership interest may be asserted by the petitioners.

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* The court below held that Ford's report of his own conversations at the time was subject to copyright. No objection is made to that holding.

A. Government Documents

The Ruth memorandum and Mr. Ford's written statement to Haig were government documents prepared by government employees on government time as part of their official duties. Mr. Ruth was acting as a special prosecutor making recommendations to his superior and evaluating the desirability of prosecuting or not prosecuting Mr. Nixon. Vice President Ford's written statement was not a personal letter but an official policy statement relating to his status as Vice President and heir-apparent to the Presidency on the issue of discussing a pardon for Mr. Nixon.

The court below found that the Ruth memorandum could not be copyrighted by Mr. Ford since it did not

originate with Ford and therefore did not meet the test of "originality" found in Section 102(a) of the Copyright Act, 17 U.S.C. § 102(a) (1982). 723 F.2d at 205. Amicus endorses that proposition. In addition, amicus believes there is another basis for denying copyright to the Ruth memorandum that is also applicable to Ford's written statement. Each of these documents constitutes a "work of the United States Government" as defined in Section 101 of the Copyright Act, 17 U.S.C. § 101 (1982): "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties." Under Section 105, 17 U.S.C. § 105 (1982), copyright protection would not be

available for either of these works.*

It makes no difference that the works in question were "presidential

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* Petitioners argued below that because the works were created before the effective date of the new Act, January 1, 1978, Section 9 of the 1909 Act, which refers to "publications" of the United States Government, and not Section 105 of the new Act, is applicable. Since the works at issue were not "published," there is no government ownership, they claim. That argument is directly contradicted by Section 301(a) of the new Act, 17 U.S.C. § 301(a) (1982), which declares that all rights within the scope of copyright "whether created before or after" January 1, 1978 are governed by the new Act. Since the cause of action here accrued after January 1, 1978, the new Act must apply to define the scope of government works. See Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981). Even if old Section 9 applied, however, petitioners could not claim rights in the documents under normal rules of copyright ownership. See discussion in the text.

materials," as opposed to other types of government works. As the following discussion will show, recent legislation and court decisions confirm the proposition that Presidents of the United States own neither the physical materials generated during their term of office nor any copyright in those materials.

It is true that for a period of approximately 150 years, Presidents of the United States routinely took their Presidential documents with them when they left office. This alleged "custom" led Attorney General William Saxbe to issue an Opinion of the Attorney General -- heavily relied upon below by the petitioners -- to the effect that President Nixon "owned"

all forty-two million documents generated by all executive department officials in the five years he served as chief executive. 43 Op. Att'y Gen., No. 1 (Sept. 6, 1974).

Neither the custom nor the opinion spoke to copyright in Presidential materials but dealt only with the physical materials themselves. Copyright law has always made a distinction between the two. See 17 U.S.C. § 202 (1982). Even assuming that the two concepts should be treated the same way, neither the "custom" nor the Attorney General's opinion can alter the legal rule embodied in Section 105 and firmly established by the case law on the subject.

First, custom in and by itself is not enough to establish a rule of law. Powell v. McCormack, 395 U.S. 486, 547 (1969); Nixon v. Sampson, 389 F. Supp. 107, 131 (D.D.C.), vacated on other grounds sub nom. Nixon v. Richey, 513 F.2d 430 (D.C. Cir. 1975).

Second, the Attorney General's opinion, generated under highly questionable circumstances,* has been repudiated by the only court that examined it,** rejected by a Presidential commission appointed to study the

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* See Nixon v. Administrator of General Services, 408 F. Supp. 321, 331 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977). See also Presidential Records Act of 1978: Hearings on H.R. 10998 Before the House Committee on Government Operations, 95th Cong., 2d Sess. at 318 (hereafter "Presidential Records Act Hearings").

** See Nixon v. Sampson, supra, 389 F. Supp. at 132-145.

problem,* roundly condemned by historians and writers,** and explicitly overturned by Congress when it passed two laws on the subject, the Presidential Recordings and Materials Preservation Act, 44 U.S.C. §§ 3315 et seq. (1982), and the Presidential Records Act of 1978, 44 U.S.C. §§ 2107, 2108, 2201 et seq. (1982). Both Acts reject the theory of Presidential ownership of documents produced within the scope of

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* National Study Commission on Records and Documents of Federal Officials, Final Report 80 (1977) (hereafter "Final Report"): "By all essential criteria the materials produced [the records and documents of the President's Office] have been 'Public Records' and were the property of the Federal Government . . ."

** Final Report at 112-129; see also Presidential Records Act Hearings at 256, 361, 245.

the Presidential office. The first law, dealing specifically with the Presidential materials of Richard Nixon, was upheld by this Court in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The second law relates to all Presidents and Vice Presidents inaugurated after January 20, 1981, in order to avoid a separation of powers problem.*

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* The Report of the House Committee on Governmental Operations on the Presidential Records Act of 1978, H.R. Rep. No. 94-1487, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5732, 5738-39, stated:

> The principle issue and the one on which all of the witnesses were in agreement, was that action should be taken by Congress to declare a Presi-

(Footnote continued on next page)

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> dent's official records the property of the United States. No definitive legal decision is currently available concerning the ownership of these papers. This is largely because, with the exception of the Nixon Presidential materials, the nearly 600-year [sic] tradition of Presidents removing their papers has never been seriously challenged. On policy grounds, however, the witnesses were in general harmony that that which is generated, created, produced or kept by a public official in that administration and performance of the powers and duties of a public office belongs to the Government and may not be considered private property of the individual.

(Footnote continued on next page)

The theory behind, and the principle of, those laws is precisely the same as that involved here: namely, that Presidents who act on behalf of and for the welfare of the people cannot take financial advantage of their office by retaining personal ownership of documents or claiming incorporeal literary rights created during their Presidential terms and as part of their Presidential duties. If a President writes a memorandum to his Secretary of State as part of his duties, the United States must own both the document and

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(Footnote continued from preceding page)

This report belies any notion that the Presidential Records Act was an implied recognition of President Ford's property rights in his Presidential materials.

the copyright in the document. That principle is not the law only now since the passage of the Presidential Records Act of 1978 and the Copyright Act of 1976; it always was the law.

Case law on the subject is directly counter to the Attorney General's Opinion. The holding of Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), an early case of Justice Story sitting on circuit, does not support petitioners' claim to copyright in Presidential materials. What was at stake in that case were primarily private letters written by President Washington and claimed by his heirs. Justice Story pointed out that government documents could be treated differently:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. (Id. at 347)

Thus, the Folsom case recognizes government ownership of copyright in

"official letters," contrary to the Saxbe opinion.

In later cases involving government documents, it has been consistently held that the physical documents and the copyright must be owned by the government employer rather than by the government employee. Under the most elemental principles, an employer who supports the work product of his employees has a right to the fruits of their labor. This rule applies to intellectual as well as physical creations. For example, under both common law rules and federal copyright law, an employer is presumed to have the exclusive right to a work created by his employees within the scope of their employment. Scherr v. Universal Match

Corp., 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970); Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 567-68 (2d Cir. 1966); Nelson v. Radio Corp. of America, 148 F. Supp. 1, 3 (S.D. Fla. 1957); Sawyer v. Crowell Publishing Co., 46 F. Supp. 471, 473 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir.), cert. denied, 323 U.S. 735 (1944).

This principle applies with equal or greater force to government employees. For example, in Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865, 881 (1874), the Virginia Supreme Court of Appeals held:

> Whenever a written record of the transactions of a public officer in his office, is a convenient

> and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document -- a public record belonging to the office and not the officer; is the property of the state and not of the citizen; and is in no sense a private memorandum. (Emphasis added)

Similarly, the federal courts have recognized that the federal government is the sole owner of any written records or work created by government employees in the discharge of, or within the scope of, their public duties. Haas v. Henkel, 216 U.S. 462, 477-80 (1910); Scherr v. Universal Match Corp., supra, 417 F.2d at 500; United States v. First Trust Co., 251

F.2d 686, 688 (8th Cir. 1958); Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444, 448 (D.D.C. 1967); United States v. Chadwick, 76 F. Supp. 919, 923 (N.D. Ala. 1948); Sawyer v. Crowell Publishing Co., supra, 46 F. Supp. at 473.

The litigation in United States v. First Trust Co., supra, concerned the ownership of rediscovered documents principally written by William Clark describing his exploratory expedition with Meriwether Lewis. The expedition had been commissioned by President Jefferson, and the court plainly stated that "[i]f Clark's notes are the written records of a government officer executed in the discharge of his official duties, they are public documents

and ownership is in the United States." 251 F.2d at 688.

In United States v. Chadwick, supra, the defendant, who had been employed as an inspector by the Department of Labor, attempted to retain certain materials after he left his government position. The court plainly stated that "[t]he notes, memoranda, statements and other material made and taken by him in the course of said employment, were and are, the property of the Government," 76 F. Supp. at 923, and ordered the defendant to return all such materials.

Only where the fruits of an official's labors are clearly produced outside the scope of his government duties may he assert ownership. In Public

Affairs Associates, Inc. v. Rickover, supra, the ownership of certain speeches made by Vice Admiral Rickover was at issue. The court, noting that the speeches were written at the Admiral's home during his leisure time and that he was not on duty or acting in an official capacity when he delivered the speeches before private audiences, upheld Rickover's ownership and found that the speeches were not publications of the government. The principle must be the same with regard to high federal officials, including the President of the United States. The President, of course, is a public servant and is not above the law. His claim to ownership of documents in his possession or to copyright is no greater than that of other officers and agents of the government.

Our system of government does not permit any one man to stand above others, for all are equally bound by the Constitution and laws of the United States.* Unlike in a monarchy, the President's powers derive solely from the elected trust placed in him by the people; they do not inure to him as an individual.** Sovereignty resides in the people, and the President serves as their agent to take care that the laws

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* The Supreme Court has affirmed that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law. . . ." United States v. Lee, 106 U.S. 196, 220 (1882).

** See Debates in the Federal Convention of 1787 as reported by James Madison, reprinted in Documents Illustrative of the Formation of the Union of American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. at 131-46 (1927).

are faithfully executed. U.S. Const. art. II, § 3. The President is an employee of the people; even as head of the Executive Branch he is an employee of the government. As the Court of Appeals stated in Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973) (per curiam):

> Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . . ." Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

> (Emphasis added; footnotes omitted)

These principles were tested when former President Nixon asserted that he owned the forty-two million documents generated during his administration and could personally dispose of those documents as he wished -- a claim similar to that made by petitioners here that President Ford owns copyright in all government documents generated during his term of office, even those written by others. In the one court decision dealing directly with the issue, Nixon v. Sampson, supra, Judge Richey rejected claims to ownership of the documents in question. Although Judge Richey's decision was subsequently vacated on the ground that he was obliged to consider first certain

statutory claims relating to the ownership of Nixon's Presidential documents, the reasoning of the case is persuasive on the points at issue here. Judge Richey accepted the basic principle urged here:

> It is a general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official. United States v. First Trust Co. of St. Paul, 251 F.2d 686, 688 (8th Cir. 1958), aff'g First Trust Co. of St. Paul v. Minnesota Historical Soc., 146 F. Supp. 652 (D.Minn. 1956), wherein the Court of Appeals set forth the well-settled principle that:
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> > "[R]ecords of a government officer executed in the

> > discharge of his official duties . . . are public documents and ownership is in the United States." (389 F. Supp. at 133)

He noted that the principle is the same when questions of copyright are raised (389 F. Supp. at 134-35):

> This principle has also found expression in cases involving the question of whether a document or other material generated by a public official is outside the scope of his duties and therefore susceptible to copyright. The most well-recognized case in this area is that of Public Affairs Associates, Inc. v. Rickover, 109 U.S.App.D.C. 128, 284 F.2d 262 (1960), rev'd and rem'd, 369 U.S. 111, 82 S. Ct. 580, 7 L.Ed.2d 604 (1962), on remand, 268 F. Supp. 444 (D.D.C. 1975). . . . The determination was to be made

by ascertaining whether the speeches were prepared "in relation to the Vice Admiral's official duties," after careful examination of the "nature and scope" of the duties of the office. Id. at 113, 82 S.Ct. at 582. On remand, the district court finding that the use of government duplicating machinery, government paper, and the services of a government secretary not determinative, held that the speeches were not "written and delivered as a part of Admiral Rickover's official duties" and, therefore, were susceptible to copyright. 268 F. Supp. at 456 (footnote omitted).

Judge Richey found that Mr. Nixon's position as President did not change the result:

> Art. II, Sec. I, cl.1 of the Constitution provides that: "The exclusive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows . . . ."
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> * * *
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> These sections of Article II compel only one conclusion: the powers and duties of the executive inure to the Office and not to any individual office-holder; for the President, although elected to the highest office in the Nation, is but a transient holder of the public trust. (Id. at 135-136.)

Judge Richey found that the Emoluments Clause of the Constitution also required this result:

> Further, not only must former President Nixon's claim of ownership be rejected as contrary to the nature of the office, but also because it is expressly negated by the

Constitution itself. Art. II, Sec. I, cl.6, generally known as the Emoluments Clause, provides that: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." Since the materials in question are directly related to the performance of the Office of the President and are of incalculable value, it would be contradictory to and a violation of, the Emoluments clause for a President to be given or to be permitted to assert a personal right to such materials.

Moreover, it was the intent of the framers of the Constitution to prevent the Office of the President from being a position of both power and profit. While they recognized that they could not divest the

office of power, they sought to prevent the corruption of the office by removing profit. They feared that if the office offered both power and profit, the persons who sought the office would "not be the wise and moderate, the lovers of peace and good order, the men fittest for trust." 1 Farrand, The Records of the Federal Convention of 1787, at 82 (as recorded by Madison) (rev. ed. 1937). (Id. at 136-37.)

Thus, no copyright may be claimed in government documents quoted by President Ford in his memoirs, and they may be reproduced by anyone.

Furthermore, as the court below found, much of the information in the Nation article (excluding the Ruth memorandum and the written statement to Haig) was presented by President Ford before the Hungate Committee and was

subsequently printed in official hearings of that Committee. Pardon of Richard M. Nixon and Related Matters, Hearings before Subcommittee on Criminal Justice of House Committee on Judiciary, 93d Cong., 2d Sess. 90-151 (1974). "This material was a 'work of the United States Government,' 17 U.S.C. § 105, and hence not copyrightable." 723 F.2d at 205 (footnote omitted). Thus, the principles cited above remove the major portion of the material cited in the Nation article from copyright protection.

B. Conversations of Others Reported by President Ford

Petitioners also claim copyright in conversations of other government officials* with President Ford during

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* There is also one conversation reported by a non-government offi-

(Footnote continued on next page)

his term of office and later reported in his memoirs. Copyright in these conversations cannot be claimed by petitioners for three additional reasons: (1) Ford's reporting of other persons' conversations was not "original" with him within the meaning of Section 102; (2) the conversations were never "marked off" from the ordinary stream of speech and are now copyrightable by no one; (3) even if they were "marked off," petitioners cannot claim copyright in them.

Section 102(a) of the Copyright Act grants copyright protection to

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cial, Ron Ziegler, at the time a personal aide to ex-President Nixon.

"original works of authorship." If an author only records the conversations of other persons, he is not engaged in the creation of an original work of authorship. He is simply transcribing what others have said. As the First Circuit said in Lipman v. Massachusetts, 475 F.2d 565, 568 (1st Cir. 1973), "Since transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product." The court below applied that basic proposition in ruling that Ford's reporting of other conversations cannot be copyrighted. "Moreover, the use of conversations attributed to other persons cannot be a borrowing of copyrighted material, because of the Act's requirement, 17 U.S.C. § 102(a), that

an author's work be his own and not originate in others." 723 F.2d at 205 (footnote omitted).

In addition, in Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 349, 244 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968), the New York Court of Appeals stated that oral conversations might well be original and creative enough so that the "principal speaker" might assert common law copyright in them. But even as to such statements, "it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech . . . ."

There is nothing to indicate that any of the persons quoted by President

Ford -- Messrs. Haig, Hartmann, Kissinger, Becker, Ziegler -- meant to "mark off [their] utterances" from the ordinary stream of speech. Their brief conversations reported in the article were short statements of fact or rejoinders to statements by President Ford* -- unlike the lengthy literary quotations of Hemingway to Hotchner which the New York Court of Appeals still found unprotectable. They simply cannot fit within the exceptions noted by the court.

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* Among the conversations reported were the following: Haig: "ride it out"; Hartmann: "silence implies assent"; Nixon: "He'd be excellent"; Kissinger: "It is my job to get along with you and not yours to get along with me".

Furthermore, it is impossible to see how President Ford can claim ownership of other people's words spoken to him. Those words were "owned" either by the United States government (since they were uttered as part of the individual's official duties) or by the individuals themselves (i.e., Ziegler), insofar as they could pass the Estate of Hemingway test. Since there is no proof of any transfer of copyright from the "principal speaker" to Ford and thence to petitioners, they cannot assert any claims based on use of those conversations.

Harris v. Miller, 50 U.S.P.Q. 306 (S.D.N.Y. 1941), is not to the contrary. That case was based on the protection accorded authors of historical

works who reconstruct or make up conversations that may or may not have occurred in the form found in the book. Thus, Frank Harris' selective recreation of a conversation years before with Oscar Wilde containing bon mots and repartee may well have been Harris' invention and reflected creative dimensions absent from this case.

In this case, great care was taken to be as accurate as possible and to report the conversations precisely. Trevor Armbrister, the professional writer who assisted Mr. Ford, checked with the original participants (Tr. 104)* and transcribed his interviews with them (Tr. 103). This

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* "Tr." indicates a citation to the trial transcript in this case.

accurate transcription belies any notion that the conversations were made-up recreations by Ford in which he may own copyright.

POINT II

PETITIONERS HAVE ONLY A LIMITED COPYRIGHT IN THE DISCUSSION OF FACTS OR INFORMATION CONTAINED IN THE FORD MEMOIRS

The Ford manuscript and memoirs contain many items of information and fact, some disclosed previously, some known only to a small group of historians and political experts, and some known only to the writer. Mr. Ford himself reveals information told to him by others on the political scene.

Copyright law does not grant to Ford a monopoly over those facts, whether previously known or not. For

example, Mr. Ford writes that "Washington Attorney Edward Bennett Williams was my first choice [for head of the C.I.A.]."* The Nation article states: "Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the C.I.A." Elsewhere Ford wrote: "Now [Haig] came to the point: 'Are you ready, Mr. Vice President to assume the Presidency in a short period of time?'" (Manuscript, p. 4) The Nation article reads: "General Haig revealed that the newly transcribed White House tapes were the equivalent of the 'smoking gun' and that Ford should prepare himself to become President."

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* The citation is to the manuscript of A Time to Heal, Plaintiffs' Trial Exhibit, No. 1 (hereafter "Manuscript"), p. 491.

These two typical examples show the lack of merit in petitioners' copyright claims. The Nation was free to report the fact that Ford wanted to select Edward Bennett Williams to become C.I.A. director. There are only a limited number of ways in which one can report that item of information: "Ford wanted to pick Williams as C.I.A. director"; "His first choice for C.I.A. head was Williams"; "Williams was at the top of the list for C.I.A. head."

According to petitioners' theory, however, all of these alternative statements are "paraphrases" of Ford's "expression" and therefore constitute copyright infringement. To accept this theory is to give Ford and petitioners a monopoly over all the facts in the

Ford memoirs, contrary to explicit declarations in the Copyright Act that grant no copyright protection to the "idea" or "discovery" embodied in the work (17 U.S.C. § 102(b) (1982)).

The Ninth Circuit, in a recent case dealing with copyright protection of factual material, Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984), wrote:

> Factual works are different. Subsequent authors wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression. For example, Landsberg's work states that "[t]he poor player simply attempts to make as many points as possible each turn." The idea contained in that statement cannot be expressed in a wide

> variety of ways. Just about any subsequent expression of that idea is likely to appear to be a substantially similar paraphrase of the words with which Landsberg expressed the idea. Therefore, similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed. 1 M. Nimmer, Nimmer on Copyright, § 2.11[A]-[B] (1968).

The court below properly found that the historical information recounted in the Ford memoirs could not be copyrighted and therefore could be used and paraphrased by any subsequent user. It should be noted that petitioners' theory would enable the original participant in an historical event to assume complete control over the facts described simply by adding his

own impressions of that event or by referring to his "state of mind." If anything, an original participant should have less protection for such descriptions because his work becomes the only source of that information, unlike a secondary work by an historian, which may draw from other source material. The descriptions of historical events by government participants must be open material; commentators should be free to describe, comment on, and criticize the governmental acts involved without fear of copyright infringement actions that would result from petitioners' theory.

Petitioners' argument in this area is contrary to case law on the subject that gives a limited copyright to works

dealing with historical facts. To cite just two recent examples, the Second Circuit held in Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980):

> A grant of copyright in a published work secures for its author a limited monopoly over the expression it contains. The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of

> copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain. As the case before us illustrates, absent wholesale usurpation of another's expression, claims of copyright infringement where works of history are at issue are rarely successful.*

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* The analysis utilized by the court in Hoehling is clearly applicable to this case. Whether or not the article is considered by this Court to make an independent "contribution [ ] to recorded knowledge," 618 F.2d at 980, the essential holding of Hoehling is that the first author has no copyright monopoly over the facts and information contained in his work. Unlike the fair use test, there is therefore no overall evaluation of the equities since plaintiffs cannot show a protectible interest ab initio in that material. See discussion in text.

Similarly, in Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981), the Fifth Circuit held that the trial court had improperly instructed the jury that "research is copyrightable", and a verdict in plaintiff's favor had to be reversed. The court explained the general principles as follows (650 F.2d at 1368):

> It is well settled that copyright protection extends only to an author's expression of facts and not to the facts themselves. . . . This dichotomy between facts and their expression derives from the concept of originality which is the premise of copyright law. Under the Constitution, copyright protection may secure for a limited time to "Authors . . . the exclusive Right to their respective Writings." U.S. Const. Art. I, § 8, cl. 8, An "author" is one "to whom anything

> owes its origin; originator; maker; one who completes a work of science or literature." Burrow-Giles Lithographic Co, v. Sarony, 111 U.S. 53, 58, 4 S.Ct. 279, 281, 28 L.Ed. 349 (1884). Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who "discovers" the fact.

The court noted that even in the so-called directory cases, copyright protection is given only to the "selection and arrangement" of factual material (id. at 1369), but "[c]opyright protection does not extend to the facts themselves, and the mere use of the information contained in a directory without a substantial copying of the format does not constitute infringement" (id. at 1369-70). The court noted that "news" is given even less

copyright protection than directories (id. at 1370):

> For example, the labor involved in news gathering and distribution is not protected by copyright although it may be protected under a misappropriation theory of unfair competition. International News Service v. The Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918). In the International News case, the Supreme Court commented in dicta that while a newspaper story, as a literary production, can [be] copyrighted,
>
> > "the news element -- the information respecting current events contained in the literary production -- is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the

> framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

These cases illustrate the approach that should be taken in a case of this kind. Absent the taking of the structure, format, or "plot" of a factual work (see Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686 (S.D.N.Y.), aff'd per curiam, 500 F.2d 1221 (2d Cir. 1974)), subsequent works are free to use any or all of the information and factual material in an earlier work. Since facts are expressed only in words, and generally in a limited number of ways, the

subsequent users should be allowed to describe these facts through words that are adequate and appropriate for conveying the underlying information. That is all the Nation did. Contrary to petitioners' assertion, any "paraphrasing" used to describe the facts in the manner indicated above is not an infringement under copyright law.

CONCLUSION

For the reasons stated above, copyright protection should not be granted to the category of material falling within the discussion above.

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